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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 485

CROSLEY BROADCASTING CORPORATION, *Petitioner*,

v.

WHBC, INC., and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 30, 1958

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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### OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit have not been officially reported and are printed as Appendix A hereto. They include: the June 16, 1958 opinion and order of the panel which first heard and decided the case (Chief Judge Edgerton and Circuit Judges Wilbur K. Miller and Washington); the September 25, 1958 opinion of the court en banc denying a petition

for rehearing; and the court's October 10 sua sponte modification of its September 25 en banc opinion.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

The court of appeals vacated a final decision of the Federal Communications Commission resolving a four-party comparative television licensing proceeding which had been pending before the Commission for three and one-half years. On the final decision day, two separate votes were taken by the Commission on the choice of the best applicant. In the first vote, six of the Commission's seven members participated; the seventh, who had been appointed but not confirmed as a commissioner at the time of oral argument ten months earlier, abstained. A plurality of three commissioners voted for petitioner Crosley Broadcasting Corporation, one commissioner voted for a second applicant, one voted for a third applicant, and one voted to reopen the record as requested by the fourth applicant. In the second vote, all commissioners participated. The commissioner who previously had abstained was induced by his colleagues to participate, and he voted for petitioner. Thus, ultimately four commissioners voted for petitioner, one voted for a second applicant, one voted for a third applicant, and one voted to reopen the record as requested by the fourth applicant. The court of appeals held that the commissioner who originally had abstained was disqualified from voting by virtue of not having heard oral argument, and that a majority—as opposed to a

plurality—vote of participating commissioners was necessary for a legally valid decision.

The following questions are presented:

1. Is a majority, as distinguished from a plurality, of the votes cast by the qualified and participating members of the Commission necessary for the adoption of a valid decision in cases involving more than two applicants?

2. Does section 10(e) of the Administrative Procedure Act authorize or permit a reviewing court to substitute its judgment for that of the Commission which had found that a previously unconfirmed appointee to the Commission, ultimately could vote on the final decision by virtue of the fact that preliminary to the oral argument, the Chairman had asked if there were any objections to participation in the case by "any commissioner who is not present," and no objection was stated?

## STATUTES INVOLVED

Three statutory provisions are involved. They are sections 4(h) and 409(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(h) and 409(b), and section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e). [This provision of the Administrative Procedure Act is incorporated by reference into section 402(g) of the Communications Act, 47 U.S.C. § 402(g).] These provisions are set forth in Appendix B hereto.

## STATEMENT OF THE CASE

The action of which review is sought vacated a final decision of the Federal Communications Commission which was adopted on March 6, 1957. That decision

finally resolved a four-party comparative proceeding involving mutually exclusive applications for a television broadcast station on channel 13 at Indianapolis, Indiana. The four applicants for this facility were Crosley Broadcasting Corporation (petitioner here and intervenor below); WIBC, Inc. (respondent here and appellant below); and Indianapolis Broadcasting, Inc. and Mid-West T.V. Corporation, which are no longer parties in interest.

The Commission's decision was based on extensive proceedings conducted over a period of some three and one-half years. It granted the application of petitioner and denied those of the three competing applicants. All losing applicants noted appeals to the United States Court of Appeals for the District of Columbia Circuit pursuant to section 402(b) of the Communications Act, 47 U.S.C. § 402(b).

As significant here, the proceedings before the Commission can be summarized as follows:

The taking of evidence before an examiner of the Commission began on March 10, 1954. On June 7, 1955, the hearing examiner released an initial decision recommending a grant of the application of Mid-West T. V. Corporation. (J.A. 10.) All parties to the proceeding subsequently filed exceptions to the initial decision and requested oral argument pursuant to section 409(b) of the Communications Act.

When the case came on for oral argument before the Commission on May 25, 1956, six commissioners were present. They were Chairman McConnaughey and Commissioners Hyde, Bartley, Doerfer, Lee and Mack. (J.A. 6.) Only Commissioner E. M. Webster, whose term was about to expire (on June 30, 1956),

was absent. One week prior to the oral argument, on May 18, 1956, President Eisenhower had nominated T. A. M. Craven to succeed Commissioner Webster for a seven-year term to commence July 1, 1956. Mr. Craven's nomination was then awaiting confirmation by the Senate, as all parties to the proceeding well knew. [102 CONG. REC. 8516 (May 18, 1956).]

After counsel for all parties had entered their appearances and immediately prior to the commencement of oral argument, the following exchange took place (J.A. 8):

> The Chairman: "Gentlemen, do you have any objection to any commissioner who is not present participating in this proceeding?"
>
> (No response.)
>
> The Chairman: "You may proceed."

The nomination of T. A. M. Craven to succeed E. M. Webster as a member of the Commission was confirmed on June 22, 1956 [102 CONG. REC. 10860 (1956)]; he assumed office on July 2, 1956. [*23d Annual Report of the Federal Communications Commission to Congress,* pp. 19, 166 (1957).]

On October 29, 1956, before any action had been taken by the Commission following oral argument, Mid-West T. V. Corporation filed a petition to reopen the record to show the resignation of its president and a change in its stock ownership, and for leave to amend its application. No action was to be taken on this petition by the Commission until March 6, 1957.

On February 27, 1957, the Commission met in executive session for the purpose of considering the

adoption of a decision in the case. Present at that meeting were Chairman McConnaughey, and Commissioners Hyde, Bartley, Doerfer, Lee, Mack, and Craven. After a discussion of the case, a vote was taken. Three commissioners (McConnaughey, Doerfer, and Mack) voted for petitioner. Two commissioners (Hyde and Bartley) voted against adopting the decision favoring petitioner. One commissioner (Lee) voted for Indianapolis Broadcasting, Inc. Commissioner Craven abstained. (J.A. 190.) Chairman McConnaughey stated that if Commissioner Craven did not vote, "the Commission will find itself at an impasse, with its statutory duty to render a decision thwarted." (J.A. 191.)

Commissioner Craven stated that he had abstained from the initial vote because "the engineering firm with which I was formerly associated" had prepared engineering data on behalf of one of the applicants. "Therefore, I would not wish to vote unless required to do so." He noted that the general counsel had previously submitted a memorandum to the Commission saying that regardless of prior connections with a party, an abstaining member can be required to vote in order to enable the Commission to reach a decision. (J.A. 191.)

The general counsel of the Commission was then called to the meeting and asked the hypothetical question of "whether a Commissioner could disqualify himself from voting if the effect would be to prevent action by the Commission upon a matter before it." (J.A. 192.) The general counsel advised that if a decision could not be reached without such a vote, "it would be appropriate for the Commission, by minute entry, to direct Commissioner Craven to participate

on the grounds that his vote was absolutely essential to the performance of the Commission's statutory duties." (J.A. 192-3.) The general counsel then left the meeting.

Commissioner Craven then stated:

> "I was not a member of the Commission when the Oral Argument was held, but the question was asked by the Chairman of the counsel present if there were any objections to absent Commissioners participating in the decision. There was no response from counsel. I have read the Oral Argument in this case and also the records necessary for me to arrive at a decision. Therefore, if it should become necessary for me to vote as a result of a directive from the other members of the Commission to break a tie I feel prepared to do so." (J.A. 193.)

The members of the Commission then discussed whether a voting impasse could be avoided without Commissioner Craven's participation. (J.A. 193.) He himself stated that he believed the other commissioners should take more time to consider the case, to make certain that they were at an impasse. (J.A. 193-4.) Accordingly, further action on the matter was deferred for a week.

One week later, on March 6, 1957, the case again was brought up for consideration. The first matter dealt with was the Mid-West petition to reopen the record. Chairman McConnaughey and Commissioners Doerfer, Lee, and Mack voted to deny this petition; Commissioners Hyde and Bartley voted to grant the petition; Commissioner Craven abstained. A vote was then taken "on the Decision [in favor of Crosley] as presented to the Commission." Commissioners

McConnaughey, Doerfer, and Mack "voted to adopt the Decision; Commissioner Hyde voted to reopen the record [pursuant to the Mid-West petition, notwithstanding the Commission's immediately prior vote *contra*]; Commissioner Bartley voted for WIBC and Commissioner Lee voted for Pulliam [Indianapolis Broadcasting, Inc.]." (J.A. 195.)

Commissioner Lee—who voted against petitioner—stated that Commissioner Craven had read the record, and that he was sure Commissioner Craven "would render his best judgment" and could vote. Chairman McConnaughey and Commissioner Mack agreed. (J.A. 195-6.) Commissioner Hyde stated that he did not think that they should ask Commissioner Craven to vote. In his opinion: (1) they had not studied the legality of Commissioner Craven's vote sufficiently; and (2) they had not studied the overall case enough to be certain that a stalemate had been reached. (J.A. 196.)

Commissioner Lee replied that Commissioner Craven had a duty to vote. (J.A. 197.) Commissioner Doerfer stated that the delays in the case had been long, and that the three favoring Crosley had made it clear several times that they would not change their votes. Thus, said Commissioner Doerfer, even if one of the other three applicants could get all of the remaining three votes, the "best these can do [from the standpoint of one of the other applicants] is create an interminable tie." (J.A. 197.)

Four of the other six commissioners thus urged Commissioner Craven to vote. Commissioner Hyde was opposed, and Commissioner Bartley did not take a specific position. (J.A. 196.) At the request of the

majority, Commissioner Craven did vote, selecting petitioner as the best qualified applicant. (J.A. 198.) Further discussion was had (J.A. 198-201), after which Commissioner Craven repeated his vote for Crosley, stating: "I vote for the proposed decision and will have a statement on it." (J.A. 202.) While the Commission's minutes thus make clear the exact nature of the votes cast, the mimeographed copy of the decision released March 8, 1957, commences merely by stating: "By the Commission: Commissioners Hyde and Bartley dissenting and issuing statements; Commissioner Lee dissenting; Commissioner Craven concurring and issuing a statement." (J.A. 9.)

All three losing applicants thereafter noted appeals to the United States Court of Appeals for the District of Columbia Circuit. Indianapolis Broadcasting, Inc. dismissed its appeal (Case No. 14037) on December 20, 1957. Mid-West T. V. Corporation dismissed its appeal (Case No. 14039) on January 10, 1958. The appeals filed by respondent WIBC, Inc. (Cases No. 14035 and 14231) were consolidated for briefing and argument. The case was argued on June 4, 1958, and disposed of twelve days later by the court's order of June 16, 1958.

In its order of June 16, the court of appeals made no reference to the plurality versus majority question which had been stressed by petitioner Crosley. Rather, in holding that respondent WIBC had "not clearly waived" the right to oral argument before Commissioner Craven, the court stated that Commissioner Craven's vote "was decisive" and hence remanded the case for reargument. (Appendix A, p. 1a.)

On July 1, 1958 Crosley filed a petition for rehearing en banc, emphasizing the fact that it relied upon

not one, but two points: (1) that objection to Commissioner Craven's participation had been waived; and (2) that Commissioner Craven's participation had no effect on the result since valid action had been taken by a plurality of the Commission's membership without his participation. On September 25, 1958, the court of appeals denied the petition for rehearing en banc, again not specifically answering the plurality-majority question. (Appendix A, pp. 2a-4a).)

On September 26, 1958, petitioner filed a motion for stay of the transmission of the court's mandate pending the preparation of this petition for a writ of certiorari. That motion was denied on October 9, 1958. One day later, on October 10, 1958, the court of appeals issued a sua sponte modification of its September 25 opinion denying the petition for rehearing. In its modification, the court specifically held that: "When a quorum is present, the Federal Communications Commission may act, but only on a vote of a majority of those present." (Appendix A, p. 5a.)

## REASONS FOR ALLOWANCE OF THE WRIT

(1) The court of appeals' action in holding that the Federal Communications Commission may validly adopt a final decision in a four-party comparative television licensing proceeding only upon the vote of a majority of those qualified and participating is not only contrary to law, but destructive of proper agency action here and elsewhere. The court's erroneous ruling on the "majority" question will further impede action of the Commission in an area where action is already difficult and delayed.

(2) The court's action in substituting its judgment for that of the Commission concerning events which

happened in the Commission's presence and upon which the Commission relied through subsequent stages of the proceeding is not only contrary to the decision of this Court in the case of *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952), but is also beyond the power and authority conferred upon a reviewing court by section 10(e) of the Administrative Procedure Act.

(3) Because of the subject matter dealt with and the identity of this particular court of appeals, the effect of the court's decision as precedent can scarcely be overstated. The decision contains two fundamental errors and strikes at the very basis of an ultimate agency function—the adoption of a final order. The fact that the entire court of nine judges specifically affirmed both the action and the reasons of the panel which originally decided the case further highlights the significance and importance of the ruling.

## ARGUMENT

### I

The court's action in holding invalid the Commission's "first" vote of March 6, 1957, in which only six commissioners participated, is based squarely on its opinion that a majority, as distinguished from a plurality, of those participating was necessary for the adoption of a valid order. This proposition is contrary to both law and reason, and the cases cited by the court in support of its action are inapposite.

The rule of law applicable here, which the court refused to apply, is as old as democratic government itself. It is that in the absence of a specific mandate, arising out of a constitutional provision, a rule of

legislative assembly, or a statutory provision, only a plurality, as distinguished from a majority, vote is necessary for legal action. The reason for this rule is as free from controversy as the rule itself. The official acts of both state and national officials throughout the history of our government have been upheld, wherever possible, since otherwise the necessary and orderly functioning of government would be unduly impeded. Virtually every decided case relating to elections, legislative proceedings, and the conduct of other governmental functions has applied this concept of liberality as long as the specific requirements of any overriding mandate have been met.[1] Here, in the absence of any such mandate, the plurality rule was and is applicable, and the court should have so found.[2]

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[1] *E.g.*, *State* ex rel. *Cleveland* v. *Stacy*, 263 Ala. 185, 82 S. 2d 264 (1955); *Ramsey* v. *Dunlop*, 146 Tex. 196, 205 S.W. 2d 979 (1947); *Howell* v. *Bain*, 176 Ore. 187, 156 P. 2d 576 (1945); *Brannon* v. *Perkey*, 127 W. Va. 103, 31 S.E. 2d 898 (1944); *State* ex rel. *Thompson* v. *Carr*, 166 Tenn. 58, 59 S.W. 2d 510 (1933); *Derringe* v. *Donovan*, 308 Pa. 469, 162 Atl. 439 (1932); *Taber* v. *Webb*, 227 Ky. 611, 13 S.W. 2d 758 (1929). A typical statement of the rule is that "a quorum of the members being present and voting for candidates, a plurality of the votes cast is sufficient to elect." *State* ex rel. *Attorney General* v. *Anderson*, 45 Ohio St. 196, 203, 12 N.E. 656, 659 (1887). See also II COOLEY, CONSTITUTIONAL LIMITATIONS 1400 (8th ed. 1927); THROOP, PUBLIC OFFICERS § 139 (1892); 29 C.J.S., *Elections* § 241 (1941).

[2] The court of appeals apparently has been confused from the outset by the majority-plurality concept. It stated in its September 25 opinion that "a plurality of a quorum of four cannot be less than a majority of it." (Appendix A, p. 3a.) This statement is true when only two parties or courses of action are involved, but is erroneous in the case of multiple parties or multiple courses of action (*e.g.*, in the case of a 2-1-1 vote). The court sua sponte withdrew this statement in its October 10 amendment, apparently realizing its obvious error, but then relied upon cases virtually all of which related to dual choice situations. (Appendix A, p. 5a.)

The error in the court's position is perhaps best illustrated by the specific cases upon which it relies. Most of those cases involve a situation where the choice is between one of only two alternatives; one of them involves an interpretation of a state statute requiring a majority; and none of them makes the holding for which they have been cited by the court.[3]

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[3] Thus, in *WHEC, Inc.*, 10 PIKE & FISCHER RADIO REG. 521 (1954), the Federal Communications Commission could vote only to grant the application in question without a hearing, or alternatively to designate it for hearing. In *Olsen* v. *State Tax Comm'n*, 109 Utah 563, 168 P. 2d 324 (1946), the only alternative was whether or not certain of appellant's sales were within a statutory exemption to the state sales tax. In *United States* v. *Ballin*, 144 U.S. 1 (1891), the sole alternative was a vote for or against a section of a tariff act. In *Frischer* v. *Bakelite Corp.*, 39 F. 2d 247 (C.C.P.A.), *cert. denied*, 282 U.S. 852 (1930), the only choice was whether or not the manufacture and sale of certain commodities constituted a patent infringement and an act of unfair competition. (As to the form of enforcement in this latter case, the sole choice was a vote approving or disapproving each of three enforcement recommendations to the President, with the vote on each recommendation not being contingent upon the votes on the others.)

The court's reliance upon *WJR, The Goodwill Station, Inc.*, 11 PIKE & FISCHER RADIO REG. 1321 (1955), is subject to the same criticism in that the Federal Communications Commission could only grant or deny a petition for rehearing. Moreover, while three applicants were competing for the available facility, the prevailing applicant had received a vote of the majority of the participating commissioners, and therefore the Commission was not called upon to determine whether the lesser vote of a plurality would have resulted in a valid decision.

In *Adkins* v. *Citizens Board*, 112 W. Va. 171, 163 S.E. 853 (1932), the West Virginia court was construing a local statute which superseded the general rule. *Brown* v. *District of Columbia*, 127 U.S. 579 (1888), is not pertinent even in the remotest sense since it involved the question of the efficacy of a contract entered into by a member of a board, purporting to act under the board's authority. The Court simply stated that the contract must be ratified by a majority of the five-man board.

The difficult, if not impossible, situation presented by the requirement of a majority vote in a case such as this one—where any one of four basically qualified applicants was open for selection—is so manifest as to require no extended treatment. Nor is the factual situation in the present case an exceptional one. On the contrary, it is typical of a situation which has occurred and will recur in a substantial class of cases.

As the result of a study conducted by the Commission for a subcommittee of the Congress, it was established that for the period between July 1, 1954 and March 7, 1958, 22 of the 53 comparative television hearings conducted by the Commission involved more than two applicants. Fourteen of these proceedings involved three applicants; five involved four applicants; two involved five applicants, and one involved seven applicants.[4] Moreover, the period covered by this study is typical of that which preceded and has followed it. Since the adoption of the present national television allocation plan in April 1952, the demand for television stations in the VHF portion of the spectrum has been so great as to result in one or more multi-party comparative proceedings for channels in virtually every metropolitan area of substantial size throughout the United States. The continuing scarcity and increasing commercial value of such facilities can only result in an accentuation of this condition in the future.

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[4] Testimony and exhibit submitted in connection therewith by James P. Radigan, Senior Specialist on American Public Law, Library of Congress, before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., May 15, 1958 (not yet officially printed).

The fact that the majority vote requirement will unduly restrict and retard the performance of agency action in an area where such action is already difficult and delayed can perhaps best be illustrated by further reference to this case and its background.

The Federal Communications Commission is an agency consisting of seven members serving terms of seven years each, with the term of one commissioner expiring annually. The vast majority of all proceedings conducted by it of an adjudicatory nature are tried initially before examiners. Many of these cases, particularly in the broadcast licensing field, require years for their completion. In all cases tried initially by an examiner, section 409(b) of the Communications Act requires that the commissioners who participate in the final disposition of a case must have been present at oral argument on exceptions to the examiner's initial decision.

The taking of evidence before the examiner in this case commenced in March of 1954. The examiner's initial decision was submitted some 15 months later (June 7, 1955). Eleven months more elapsed before argument was conducted on exceptions to the examiner's initial decision (May 25, 1956), and ten months more elapsed between the oral argument and final decision (March 6, 1957). A total period of three and one-half years therefore elapsed between the commencement of taking evidence and the Commission's final decision in this case—a time-consuming but entirely typical operation.

The previously referred-to Commission study reporting on the 53 comparative television hearings conducted during the period July 1, 1954 to March 7,

1958, does not give the total elapsed time from the first taking of evidence to final decision in those cases. But it does give the time periods: (1) from date of initial decision to date of final decision, and (2) from date of oral argument to date of final decision. The average time period between the dates of initial decision and final decision in those 53 cases—without regard to the specific number of applicants involved in each case—was 13.4 months, as contrasted with 22 months in this case. The average time period between oral argument on exceptions and the date of final decision in these cases was 6.8 months, as contrasted with ten months here. Further details given by the Commission's study show, as expected, that the time periods are correspondingly greater in cases where a greater number of applicants is involved. *E.g.*, the five four-party proceedings required an average time period of 11.2 months between oral argument and final decision, as contrasted with the ten month period here.[5] In brief, these figures demonstrate that agency action in the area of comparative selection among multiple applicants is already difficult and delayed, and that the case at bar is typical of such proceedings generally.

The circumstances considered, the coincidence of dates and numbers required for the disposal of cases such as this—pending for three or more years—already presents great procedural and practical difficulties. These arise out of present statutory provisions staggering the term periods of the seven commissioners [47 U.S.C. § 154(c)], and requiring the presence of commissioners at oral argument on exceptions to an examiner's initial decision as a qualification for par-

[5] *Ibid.*

ticipation in the final decision and order in such cases [47 U.S.C. § 409(b)].[6] The imposition of the further and legally unwarranted requirement of majority concurrence in the adoption of a final decision in multiparty proceedings will, as here, defeat or further unduly prolong final agency action. The only apparent alternative is agency action at the price of agreed abstentions of agency members, or the trading of agency votes, or both—a price which the law does not, and should not, require.[7]

## II

The court's action in holding invalid the Commission's "second" vote of March 6, 1957, in which all seven commissioners participated, is based upon a subsidiary error, but one which compels attention and requires correction. It is manifestly clear that respondent WIBC waived any objection which it might otherwise have had to Commissioner Craven's vote participation. This is so because its counsel, when confronted with the Chairman's inquiry as to whether the parties objected to future participation by "any

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[6] In denying the petition for rehearing, the court stated that its ruling was based "solely on the fact that the decisive vote was cast by one who had not heard oral argument." (Appendix A, p. 3a.) Since at least one new commissioner is appointed each year, and since other commissioners are often absent from oral argument due to illness, duties out of town, etc., the court's decision presents practical difficulties of serious magnitude in multiparty proceedings.

[7] This Court has pointed out that where a rule governs the outcome of a vote and one construction "would be productive of the greatest inconvenience, [it] * * * ought not to be adopted, unless the legislative will to that effect is clearly expressed." *Cass County* v. *Johnston*, 95 U.S. 360, 369 (1877).

commissioner who is not present," had a duty to respond. (J.A. 8.) Having failed to do so, such failure cannot be converted into an asset to the detriment of others. *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

Here the facts of which respondent WIBC's counsel had both actual and constructive knowledge were such as to convince any reasonably prudent person that what did occur, would have occurred. When oral argument began on May 25, 1956, less than six weeks remained before the expiration of Commissioner Webster's term on June 30, 1956. His successor, T. A. M. Craven, had been nominated and his nomination was awaiting confirmation by the Senate. Since the 1952 amendment of section 5 of the Communications Act, it has been the function of the Commission's review staff to prepare decisions in cases according to instructions voted by the Commission after oral argument on exceptions to the examiner's initial decision. After the preparation of such a decision by the review staff, a later vote is taken by the Commission on its adoption. [47 U.S.C. § 155(c).] The Commission's study of comparative television proceedings already referred to *supra* shows that for the 53 proceedings in the July 1, 1954 to March 7, 1958 period, an average period of 5.5 months elapsed from the date of instructions to final decision regardless of the number of applicants involved. In a case such as this—involving four parties and a voluminous record—it was all but certain that a final decision could not, and would not, be made until after the expiration of Commissioner Webster's term.

To construe what occurred as amounting to less than respondent WIBC's consent for Commissioner Craven

to participate in the Commission's decision is to render human conduct meaningless. It is wholly unrealistic to contend that when the Chairman's inquiry was put, counsel for respondent did not consider and weigh the probable, if not certain, participation of Commissioner Craven in later stages of this proceeding. Moreover, the question could have had no other meaning than that attributed to it by the Commission. To hold, as the court apparently did, that the Chairman should have been more precise, or that other parties had the responsibility to determine his exact meaning for respondent WIBC, is both illogical and unsound.

But the basic and fundamental error committed by the court was its failure to give proper and legal effect to the findings and determination of the Commission on this subject. A majority of the Commission present at oral argument not only found that the failure of counsel to respond to the Chairman's inquiry amounted to an agreement to proceed and acted accordingly, but it later reached and stated the same conclusion in response to pleadings addressed specifically to this subject. It thus made an express finding on this subject not once, but twice. (J.A. 8, 182-189.)

In so doing the Commission performed an official act as necessary for the overall discharge of its duties under the Communications Act as any which can be imagined. It is not and cannot be the purpose of section 10(e) of the Administrative Procedure Act to permit a reviewing court to usurp the functions of an agency in matters of this kind.[8] Action of this sort

[8] In the case of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), the scope and purpose of judicial review of agency action

with respect to a lower court's determination would not be attempted by a court of appeals. The fact that an agency was involved here makes it even less acceptable.

On the assumption, which we deny, *supra*, that Commissioner Craven's vote was necessary for the adoption of the Commission's decision and order of March 6, 1957, it is manifestly clear that respondent WIBC waived any objection thereto and that such vote was properly cast. The Commission's decision was therefore validly adopted by the Commission's "second" or majority vote, if not by its "first" or plurality vote.

## III

The judgment of which review is sought is not only destructive of proper agency action here, but will have serious consequences elsewhere. Because of the subject matter dealt with and because of the identity of the court, its effect as precedent can scarcely be overstated.

Here the United States Court of Appeals for the District of Columbia Circuit — with exclusive jurisdiction to review action of the Federal Communications Commission in the broadcast licensing field, and with exclusive or coordinate jurisdiction to review

---

was exhaustively dealt with. Limitations upon the review of agency determinations which do not require agency expertise as well as those which do were recognized. In discussing its holding, on page 488, the Court said:

> "[We do not] mean that even as to matters *not requiring expertise* a court may displace the Board's choice between two conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." (Emphasis added in part.)

the action of virtually all federal agencies — has pronounced judgment. Moreover, the judgment pronounced not only is based upon erroneous considerations, but strikes at the very basis of the manner in which any agency may legally adopt a final order.

In imposing the majority vote requirement here, the court has decided erroneously an important question of federal law which has not been, but should be, settled by this Court. In refusing to accept the Commission's finding and determination on the waiver question, the court has decided a federal question in a manner in conflict with the applicable decisions of this Court and with the provisions and purpose of section 10(e) of the Administrative Procedure Act. The fact that the entire court of nine judges has specifically affirmed not only the holdings but the reasons of the panel which originally decided the case, further highlights its significance and importance.

## CONCLUSION

As this Court has pointed out, the Communications Act was not intended as a code for the adjustment of private disputes. "Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

It is manifest that this purpose of the Act cannot be effectively carried out if confusion exists concerning the proper performance of one of the most important duties which the Commission must perform —the adoption of a final decision in a case such as this.

It is respectfully prayed that the instant petition for writ of certiorari be granted.

Respectfully submitted,

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October 30, 1958

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Nos. 14,035 and 14,231

WIBC, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
CROSLEY BROADCASTING CORPORATION, *Intervenor*

---

ORDER

---

Filed June 16, 1958

Before EDGERTON, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

PER CURIAM: These cases came on for consideration on the transcript of the record and were argued by counsel.

After consideration the Court is of the view that since Commissioner Craven's vote was decisive in effecting the entry of the orders here complained of, he should not have voted without having heard oral argument, such argument having been requested and not clearly waived. See *Bay State Beacon, Inc.*, 3 R. R. 1464 (1947); *WBNX Broadcasting Co.*, 4 R. R. 205 (1947); 47 U. S. C. § 409(b) (1952). For this reason the Commission's orders will be vacated, without prejudice to such proper steps as the Commission may desire to take to maintain uninterrupted television service to the public on Channel 13 in Indianapolis, through the intervenor or otherwise, pending final decision. The Commission should reset the case for oral

argument. Any final order which may thereafter be entered may be brought before this Court for review in the usual manner in a new proceeding. Under the circumstances, and inasmuch as the question may not hereafter arise, the Court does not reach the question whether Commissioner Craven is disqualified to vote in this case, and expresses no opinion on the subject.

Accordingly, it is ORDERED by the Court that the orders of the Federal Communications Commission appealed from herein be, and they are hereby, vacated and that these cases be, and they are hereby, remanded to the Federal Communications Commission for further proceedings consistent with the views above expressed.

---

On Intervenor's Petition for
Rehearing En Banc

---

Decided September 25, 1958

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* These cases are again before us on a petition for rehearing *en banc* filed July 1, 1958, by the intervenor, Crosley Broadcasting Corporation, in which it is contended (1) that objection to Craven's participation was waived, and (2) that Craven's participation had no effect on the result.

Objection to Craven's participation was based on two grounds: (a) that he had not heard oral argument which was held before he became a commissioner, and (b) that he had previously been employed by one of the parties. As to the second basis, we said in the order complained of,

". . . the Court does not reach the question whether Commissioner Craven is disqualified to vote in this case, and expresses no opinion on the subject." So the order was based, as it said, solely on the fact that the decisive vote was cast by one who had not heard oral argument.

It was not claimed in argument that Craven's possibly disqualifying previous employment had been waived. It was said that his participation in oral argument had been waived; and the basis for saying so was the announcement that any absent commissioner might take part, to which there was no objection. But Craven was not then an "absent commissioner"—he was not a commissioner at all. That is the reason we said in the order that oral argument before him had not been "*clearly* waived."

The intervenor seeks to show that Craven's participation had no effect on the result, although it was stated by the Commission that his vote was necessary to avoid an impasse. As a matter of fact, without him, six commissioners voted. Three of them voted for Crosley and the other three voted in other ways, as a result of which Crosley had three votes out of six. The petition for rehearing reasons that three votes were sufficient. It says: ". . . [O]nly the concurrence of a plurality—as distinguished from a majority—of the quorum required by section 4(h) is necessary for legal action." This is a meaningless statement, because a plurality of a quorum of four cannot be less than a majority of it.

Section 4(h) is 47 U. S. C. § 154(h) and is as follows: "Four members of the Commission shall constitute a quorum thereof. The Commission shall have an official seal which shall be judicially noticed." From this the intervenor reasons that, although seven were present and six voted (as long as Craven abstained), three votes would control the Commission's action because § 4(h) says that four members shall constitute a quorum. According to this

reasoning, three votes would control, no matter how many were present and voted.

The truth is that when six voted, it took four to control; that is why the Commission insisted that Craven vote. When he did, there were seven participants and it still took four to control; hence his vote was decisive.

The petition for rehearing *en banc* is denied.

---

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

September Term, 1958

No. 14,035 and No. 14,231

WIBC, Inc., *Appellant,*

v.

Federal Communications Commission, *Appellee,*
Crosley Broadcasting Corporation, *Intervenor.*

---

Filed: October 10, 1958
Joseph W. Stewart, Clerk

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Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges.

**Order**

It is ORDERED by the court that the opinion filed September 25, 1958, denying the petition for rehearing *en banc* be, and it is, amended as follows:

By deleting therefrom the following sentence in lines 24, 25 and 26 on page 3 of the slip opinion:

> "This is a meaningless statement, because a plurality of a quorum of four cannot be less than a majority of it."

and substituting therefor the following:

> "This is an incorrect statement. When a quorum is present, the Federal Communications Commission may act, but only on the vote of a majority of those present. This is manifest not only from its action in the present case, but also from previous pronouncements. *WHEC, Inc.*, 10 R. R. 521; *WJR, The Goodwill Station*, 11 R. R. 1321. Its practice in that respect is in accord with the authorities concerning the action of Congress as well as administrative agencies. *Brown* v. *District of Columbia*, 127 U. S. 579, 586 (1888); *United States* v. *Ballin, Joseph & Co.*, 144 U. S. 1 (1891); *Frischer & Co.* v. *Bakelite Corp.*, 39 F.(2d) 247, 255 (C.C.P.A.), *cert. denied* 282 U. S. 852 (1930); *Olsen Co.* v. *State Tax Comm'n*, 109 Utah 563, 168 P.(2d) 324 (1946); *Adkins* v. *Citizens Board*, 112 W. Va. 171, 163 S. E. 853 (1932). In the latter case the court said: 'It is the common law that where joint authority is involved, a quorum being present, legal action can be taken by a majority and by none less.'"

*Per Curiam.*

Dated: October 10, 1958

## APPENDIX B

COMMUNICATIONS ACT OF 1934, AS AMENDED.

*Section 4(h):*

"Four members of the Commission shall constitute a quorum thereof. The Commission shall have an official seal which shall be judicially noticed." Act of June 19, 1934, c. 652, § 4, 48 STAT. 1066, 47 U.S.C. § 154(h).

*Section 402(g):*

"At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 10(e) of the Administrative Procedure Act." Act of June 19, 1934, c. 652, § 402, 48 STAT. 1093, as amended, 66 STAT. 718, 47 U.S.C. § 402(g).

*Section 409(b):*

"The officer or officers conducting a hearing to which subsection (a) of this section applies shall prepare and file an initial decision, except where the hearing officer becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision. In all such cases the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision, order, or requirement. All decisions, including the initial decision, shall become a part of the record and shall include a statement of (1) findings and conclusions, as well as the basis therefor, upon all material issues of fact, law, or discretion, presented on the record; and (2) the appropriate decision, order or requirement." Act of June 19, 1934, c. 652, § 409(b), 48 STAT. 1096, as amended, 66 STAT. 721, 47 U.S.C. § 409(b).

ADMINISTRATIVE PROCEDURE ACT.

*Section 10(e):*

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." Act of June 11, 1946, c. 324, § 10(e), 60 STAT. 243, 5 U.S.C. § 1009(e).

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No. 486

# In the Supreme Court of the United States

October Term, 1958

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CHESAPEAKE BROADCASTING CORPORATION, PETITIONER

*v.*

WTBO, INC., AND FEDERAL COMMUNICATIONS COMMISSION

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION

---

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

JOHN A. FITZGERALD,
General Counsel,
Federal Communications Commission, Washington 25, D. C.

# In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 485

CROSLEY BROADCASTING CORPORATION, PETITIONER

*v.*

WIBC, INC., AND FEDERAL COMMUNICATIONS COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION

In this case the court of appeals vacated a Commission order granting, after comparative hearing, a television station license, on the ground that Commissioner Craven, one of the four Commissioners who comprised the majority which voted for the successful applicant, had improperly participated because he had not heard the oral argument. The court ruled that "When a quorum is present, the Federal Communications Commission may act, but only on the vote of a majority of those present" (Pet. App. 5a); and that objection to Commissioner Craven's participation had not been clearly waived.

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It has been the Commission's consistent view that a majority of its participating members rather than, as petitioner contends (Pet. 11–17), a mere plurality is required for a decision awarding a television license. The Commission believes that the decision of the court below on this question, although it may in its practical application give rise to administrative problems, is in accord with settled law and general practice. Although the Commission contended in the court below that there had been an effective waiver by the parties of their right under Section 409 (b) of the Communications Act to have a Commissioner participating in the final decision actually present at the oral argument, it does not believe that, in the light of the facts of this case, the contrary ruling presents a question of general importance.

Respectfully submitted,

J. LEE RANKIN,
*Solicitor General.*

JOHN L. FITZGERALD,
*General Counsel,*
*Federal Communications Commission.*

DECEMBER 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 485

CROSLEY BROADCASTING CORPORATION, *Petitioner*

v.

WIBC, INC. and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

## BRIEF OF RESPONDENT, WIBC, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WIBC, INC.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

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No. 485

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CROSLEY BROADCASTING CORPORATION, *Petitioner*

v.

WIBC, INC. and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

---

## BRIEF OF RESPONDENT, WIBC, INC.

## IN OPPOSITION

## TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

### STATUTES INVOLVED

In addition to those statutory provisions identified in the petition, Section 4 (a) and (i) and Section 303 (1) of the Communications Act of 1934, as amended (47 U.S.C. Sections 154 (a) and (i) and Section 303 (1)) are involved. These provisions are set forth in Appendix A hereto.

## QUESTIONS PRESENTED

**Preliminary Statement**

This case was originally decided before the Federal Communications Commission by its Order of March 6, 1957. That order was entered on a four-to-three vote.[1] Commissioner T. A. M. Craven cast the fourth and decisive vote. Commissioner Craven, who up to the time of oral argument had been an engineering

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[1] "Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of

| | |
|---|---|
| INDIANAPOLIS BROADCASTING, INC.<br>Indianapolis, Indiana | DOCKET NO. 8906<br>File No. BPCT-281 |
| WIBC, INC.<br>Indianapolis, Indiana | DOCKET NO. 8908<br>File No. BPCT-328 |
| MID-WEST T. V. CORPORATION<br>Indianapolis, Indiana | DOCKET NO. 10947<br>File No. BPCT-1599 |
| CROSLEY BROADCASTING CORPORATION<br>Indianapolis, Indiana | DOCKET NO. 10948<br>File No. BPCT-1837 |

For Construction Permits for New Television Stations (Channel 13)

DECISION

By the Commission: *Commissioners Hyde and Bartley dissenting* and issuing statements; *Commissioner Lee dissenting*; Commissioner Craven concurring and issuing a statement.

"IT IS, THEREFORE, ORDERED, This 6th day of March, 1957, that the application of Crosley Broadcasting Corporation for a new commercial television broadcast station to operate on Channel 13 in Indianapolis, Indiana IS HEREBY GRANTED, subject to the condition that its antenna structure shall be painted and lighted in accordance with Part 17 of the Commission's Rules; IT IS FURTHER ORDERED, That the applications of Indianapolis Broadcasting, Inc., WIBC, Inc., and Mid-West T.V. Corporation for the same facilities ARE HEREBY DENIED . . ." (J.A. 9, 163). (Emphasis Supplied)

representative of one of the parties to the case, was not a member of the Commission at the time of oral argument.[2] He did not hear oral argument as required by statute.[3]

Petitioner's first attempt to avoid the fact that Commissioner Craven voted without having heard oral argument is on a plurality-majority theory. In order to present the plurality-majority question, Petitioner must show that the decision of the Commission was not by a four-to-three vote. Petitioner cannot, however, avoid the fact that the decision was the result of a four-to-three vote. In an effort to avoid this fact, Petitioner has not referred to the four-to-three Order of the Commission of March 6, 1957, but resorts instead to minutes of certain *internal dis-*

---

[2] According to minutes of the Commission for February 27, 1957, Craven said:

> "I was not a member of the Commission when the Oral Argument was held . . ." (J.A. 193)

He also said:

> "My reason for abstaining from voting is because the engineering firm with which I was formerly associated prepared the engineering phases of the application, participated in pretrial conferences and attended the hearings in behalf of one of the applicants in this proceeding." (J.A. 191)

[3] The Communications Act provides for reference to examiners and an initial decision by an examiner. The statute then provides:

> "In all such cases the Commission shall permit the filing of exceptions to such initial decision . . . and shall, upon request, *hear oral argument* on such exceptions before the entry of any final decision, order, or requirement." (48 Stat. 1096 (1934), as amended, 47 U.S.C. sec. 409 (b) (1957)). (Emphasis Supplied)

In this case, such exceptions were taken and a request for oral argument was filed.

*cussions and preliminary* voting of the Commission leading up to the entry of the Order of March 6, 1957. This technique results in the following erroneous statements appearing on pages 2 and 3 of Petitioner's "Questions Presented":—

1. Two separate votes were not taken on the final day on the choice of the best applicant and petitioner's reference to a "first vote" and "second vote" are misleading and inaccurate.[4]
2. It is not a fact that "ultimately four commissioners voted for petitioner, one voted for a second applicant, one voted for a third applicant, and one voted to reopen the record."
3. The Court of Appeals did not *hold* "that a majority—as opposed to a plurality—vote of participating Commissioners was necessary for a legally valid decision."

All of the Petitioner's characterizations of "two decisions" are misleading because the only vote on the order of the Commission which decided the case was the final four-to-three vote.

Petitioner's second attempt to avoid the fact of Craven's voting without having heard oral argument is on the ground of waiver. Petitioner uses the argumentative term "substitute its judgment" in reference to the Court of Appeals' decision that Re-

[4] Respondent frankly is not certain of petitioner's meaning when petitioner refers to "two separate votes" and to a "first vote" and a "second vote," which terminology has never before been used at any stage of this proceeding. Although the petition does not identify or define these terms, it seems likely that the term "first vote" is intended to apply to the vote reflected in the Commission's minutes of March 6, 1957. (J.A. 194-202) The term "second vote" presumably refers to the published Order of March 6, 1957, which decided the case.

spondent had not waived oral argument before Commissioner Craven. The legal issue of waiver arose out of the following question asked at the oral argument, at which time Commissioner Craven was not a member of the Commission:

> "Gentlemen, do you have any objection to any Commissioner who is not present participating in this proceeding?" (J.A. 8)

To this question there was no response.

**Analysis of Petitioner's Questions**

Since the Order of the Commission was entered on the basis of four votes for an award to Petitioner and three votes against that award, the first question stated by Petitioner is a wholly hypothetical one. The question neither decided the case in the Court of Appeals nor would it decide the case now.

Since the Court of Appeals decided a question of law on the basis of undisputed facts when it ruled that respondent had not waived its right to oral argument before Commissioner Craven, Petitioner's second question is also a hypothetical one and tenders no issue which would be decisive of this case.

Although Petitioner may desire answers to its hypothetical and argumentative questions, it has stated no questions "expressed in the terms and circumstances of the case," as required by this Court's Rule 23 (c).

## STATEMENT OF THE CASE

### The Order of the Commission

The Order of the Federal Communications Commission awarding Channel 13 in Indianapolis to Petitioner was entered on March 6, 1957. It has never been contended by any party to the proceeding that this published document, certified by the Secretary of the Commission, inaccurately reflects either what the Commission decided or the votes of the commissioners.

As an examination of the Order shows, Commissioners McConnaughey, Mack, Doerfer and Craven voted therein for Petitioner; Commissioners Lee, Hyde, and Bartley dissented. Two of the dissenters wrote opinions stating various affirmative views and preferences, but all three of the dissenters expressly voted against an award to Petitioner: (J.A. 9, 164-68) Accordingly, the Order of March 6, 1957, was entered as a result of the vote of four commissioners for Petitioner, and three commissioners against Petitioner. The decisive fourth vote for the Order was cast by Commissioner Craven who up to the time of oral argument had been an engineering representative for one of the parties to the case, who was not on the Commission at the time of the oral argument, and who, therefore, did not hear oral argument.

### The Preliminary Votes and Discussions

The Commission's internal discussion and preliminary voting *prior to* the entry of the Order of March 6, 1957, appear in the minutes of the Commission, which minutes are the acts of the Minute Clerk of the Commission, are only "as complete as possible," and are "not necessarily verbatim."

(J.A. 190) Although Respondent contends that these internal and preliminary considerations of the Commission are irrelevant, the minutes reflect only one vote on the merits of the case on March 6, 1957. Insofar as the merits were concerned, Commission Chairman McConnaughey presented the question of a decision for Petitioner to the other six commissioners. (J.A. 195) Then Commissioners McConnaughey, Mack and Doerfer voted to adopt said decision. Commissioners Hyde, Bartley and Lee, while stating various preferences and views including the propriety of reopening the record, voted against the adoption of said decision. Commissioner Craven did not vote. (J.A. 195) Chairman McConnaughey then stated the results of the vote as follows:

> ". . . three Commissioners had reached a decision to adopt the Decision and three to not adopt." (J.A. 196)

Following the three-to-three vote, and after a discussion of whether Commissioner Craven should vote at all in view of what the commissioners termed an "impasse" (J.A. 200), Commissioner Craven voted for the award to Petitioner. (J.A. 202) In his concurring statement, Commissioner Craven justified his voting on the ground that the other six commissioners were "hopelessly deadlocked and that no decision can be reached without my participation." (J.A. 168)

Craven's vote increased to four the number of commissioners voting for adoption of the decision to make the award to Petitioner and left at three the number of commissioners voting against that award. As reflected in the minutes themselves (J.A. 195-202) and in the Commission's decision and Order of

March 6, 1957, three Commissioner's expressly dissented from the award to Petitioner.

**Facts Concerning the Oral Argument**

Disregarding irrelevant and immaterial matter, the following are the undisputed facts concerning Commissioner Craven's voting without having heard oral argument:

1. At the time of the oral argument, there were seven members of the Commission. These men were Commissioners McConnaughey, Doerfer, Mack, Hyde, Bartley, Lee and Webster.
2. At the time of the oral argument, Craven, who up to that point had been engaged in the case as engineering counsel for one of the parties to the case, was not a member of the Commission. (J.A. 167, 191)
3. Of the seven Commissioners, six were present at the oral argument. Commissioner Webster was absent. (J.A. 6)
4. The question asked by the Chairman at the oral argument was whether there was any objection "to *any Commissioner who is not present* participating in this proceeding," to which there was no response. (J.A. 8) (Emphasis Supplied)
5. Approximately a month after the oral argument, Craven became a Commissioner.

**The History of the Case**

*Administrative Review.* Promptly following the Commission's Order of March 6, 1957, the issue of Craven's voting without having heard oral argument was raised. The review was confined to the Order of March 6, 1957. It did not extend to the internal and preliminary discussions of the commissioners. The

Commission at no time contended or ruled that the vote of Craven was unnecessary to its final order, nor that the case had been decided previously or without his vote. Nor did the Petitioner or any other party at any time during administrative review make either of those contentions.[5]

*Contentions in the Court of Appeals.* After the exhaustion of administrative review, WIBC, Inc., Respondent herein, appealed to the U. S. Court of Appeals for the District of Columbia Circuit. Other appellants thereafter dismissed their appeals. The Commission was the appellee before said Court of Appeals and Petitioner was an intervenor. Petitioner raised the asserted plurality-majority issue for the first time in the Court of Appeals and contended that Craven's vote was unnecessary. But the Commission relied in that Court on waiver and a contention of administrative necessity in defending Craven's voting. The Commission contended in its brief and argument that an "*unbreakable impasse*" existed and that Craven had to vote to break the "*deadlock.*" The Commission's brief also referred to the need for a "*tie-breaking measure.*" The principal argument of the Commission was that the vote of Craven was "*absolutely necessary*" in order for the Commission to decide the case.

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[5] Although the motions and petitions and responses thereto filed during administrative review are printed at length in the Joint Appendix, the contentions of the parties and grounds for rulings may more conveniently be determined by examining the following rulings of the Commission: Order of June 21, 1957 (J.A. 175-81); Memorandum Opinion and Order of June 21, 1957 (J.A. 181-89); Memorandum Opinion and Order of October 25, 1957 (J.A. 243-62); Memorandum Opinion and Order of October 25, 1957 (J.A. 263-67); and Memorandum Opinion and Order of October 25, 1957 (J.A. 267-77).

*The Action of the U. S. Court of Appeals for the District of Columbia Circuit:* The Court of Appeals did not review the internal and preliminary discussion of the Commission reflected in the minutes. Instead, the Court of Appeals reviewed the Order of the Commission of March 6, 1957. The Court held that Craven was disqualified because he had not heard oral argument and that oral argument before Craven had not been waived. Contrary to Petitioner's contention at page 2 of its petition, the Court clearly did not *hold* "that a majority — as opposed to a plurality — vote of participating commissioners was necessary for a legally valid decision." The Court did *discuss* this point in denying a subsequently filed petition for rehearing *en banc*. It noted, among other things, the Commission's contention in the Court of Appeals that the vote of Craven "was necessary to avoid an impasse." The remaining language of the Court concerning the plurality-majority contention must be considered in the context of the facts of the case which the Court was then deciding. That case, as has been stated, involved an order issued upon a four-to-three vote. The plurality-majority discussion by the Court was unnecessary to its decision. It did not decide the case. Accordingly, applying ordinary legal principles, it cannot be stated that the Court of Appeals made any *holding* on the hypothetical plurality-majority question.

*The Position of the Commission.* Unlike petitioner, the Commission, appellee in the court below, did not petition that court for rehearing. Consistent therewith, the Commission does not appear as a Petitioner in this Court. Thus, the administrative body whose actions and procedures are involved expresses no

concern as a result of the effect of the rulings of the Court of Appeals.

## ARGUMENT

### I

### THE PLURALITY-MAJORITY QUESTION

#### The Commission's Order Moots This Question

The only order of the Commission deciding this case is the published and certified Order of March 6, 1957. The Commission's consideration of this case prior to the entry of this order did not decide the case. And the discussion and voting prior to the entry of this order was merely preliminary discussion and was merged into the final order at the time it was entered.

The Order of March 6, 1957 was the only order which, throughout administrative review and in the Court of Appeals, was treated by the Commission as the official action of the Commission. The appeal to the Court of Appeals was from this order and not from any minutes or preliminary voting of the Commission. The appeal would not have been supportable on the basis of the minutes of the Commission. It was the Order of March 6, 1957, and not the prior minutes and voting of the Commission, which was reviewed by the Court of Appeals. It has never been, and is not now contended, that this order inaccurately reflects the views of the commissioners. No more warrant exists here for going behind the Order of March 6, 1957 than would exist for going behind the decision of a court in order to examine the judges' views as expressed in conference. Until preliminary tests of views in conference result in the entry of an order by any tribunal, in legal effect

no final and binding act by that tribunal has taken place. Accordingly, if the action of the Court of Appeals is to be reviewed, such action must be reviewed with reference to the Commission's Order of March 6, 1957.

The votes of the commissioners appear on the face of the decision preceding the Order of March 6, 1957. Four commissioners voted for an award to petitioner and three commissioners voted against such award. *Regardless of the reasons for these votes or views which the three dissenters may have had on other questions, each of the three dissenters expressly voted against the award which four commissioners voted for.* This means that in this case, where there were three votes against an award to petitioner, the requirement of either a plurality *or* a majority was four votes. Accordingly, the Court of Appeals rejected the contention that Craven's vote was unnecessary to the Order. What was true in the Court of Appeals is still true. In this case the plurality-majority issue is wholly a hypothetical one, which issue neither decided the case in the Court of Appeals nor would decide the case now. Regardless of the question of how many votes are or are not required for *a* decision, four votes were required here because there were three votes against *the* Order finally entered.

**The Question Is Also Moot in the Preliminary Minutes**

Even if this Court were to look behind the Order of March 6, 1957 and examine the test voting prior to that order on the basis of the Minute Clerk's entries, it would find that the petition errs in stating the character of this voting. A fair reading of these

entries discloses that the final preliminary votes were exactly those which appeared in the Order of March 6, 1957 on the basis of which the Order was entered.

The minutes for March 6, 1957 show that the commissioners voted "on the Decision as presented to the Commission" by its staff. This proposed decision was the award to Petitioner. (J.A. 195, 198) After Commissioners McConnaughey, Mack and Doerfer had voted for that decision, the other three, while expressing various preferences among the other applicants and on other questions, stated negative views about the decision for petitioner. That this was the substance of the statements of these latter three commissioners is apparent from the Chairman's statement that after the vote of the commissioners a decision had been reached by ". . . three to not adopt" the award to petitioner. (J.A. 196) Dissent of the three commissioners is also the only reasonable inference from the protracted discussion concerning deadlocks and impasses which, as Craven stated in his Concurring Statement, induced him to vote. The minutes then conclude with the following entry: "Commissioners Hyde and Bartley dissenting and issuing statements; Commissioner Lee dissenting . . ." (J.A. 202)

Since the commissioners were not voting abstractly, but were voting on the proposition of an award to Petitioner, it is apparent that in the final vote prior to the order itself, three commissioners voted *against* said order. Even if the Order of March 6, 1957 is disregarded, the petition does not candidly and fairly describe the "*ultimate*" vote. There the voting was

r in favor of an award for Petitioner and three inst such an award. The plurality-majority issue s is also moot on the basis of the Minute Clerk's es of the preliminary discussions and positions of commissioners.

**Doctrine of the Chenery Case**

n addition to its hypothetical character, there is ther defect to the assertion of the plurality-jority issue. As has been stated, the contentions the vote of Craven was unnecesary to the order, that the case was decided without his vote, have er at any time been made by the Commission itself. the contrary, the administrative necessity ground oted by the Commission during administrative ew and in the Court of Appeals to justify Craven's ticipation was the antithesis of such a contention. in the Court of Appeals, Petitioner is in the sition of saying that the Commission had really ided for Petitioner in certain preliminary checking positions when the Commission itself thought it s at an impasse. The Federal Communications mmission is a creature of Congress. The actions the Commission should not be justified upon ounds different than those upon which the Commis-on itself relied. *Securities and Exchange Commission* v. *Chenery Corp, et al.*, 317 U.S. 80, 87, 63 up. Ct. 454, 87 L. Ed. 626, 633 (1943).

**he Merits of the Question**

If petitioner could overcome the problems of moot-ss and the *Chenery* doctrine, the merits of its ntention could be examined. It is significant that titioner is unable to cite a single case which decides

that only a plurality vote is required in the Federal Communications Commission or any comparable Federal agency. This is not a mere coincidence. The Communications Act of 1934 provides a standard of "public convenience, interest, or necessity" and authorizes licensing in accordance with this standard.[6] Congress has constituted a commission of seven members authorized to make the decisions as to public convenience, interest or necessity.[7] If the plurality rule were in effect, as few as two commissioners could control the award in a case involving six applicants. As stated in the statistics appearing on page 14 of the petition, this number of applicants does not represent an exaggerated case.

Splinter and minority decisions generally are not in the public interest. And a statute fixing a public convenience, interest or necessity standard and establishing a commission of seven persons to apply that standard may not reasonably be interpreted as contemplating a decision by two of these persons. Without more in the statute, it is unreasonable to claim that Congress contemplated a determination of public convenience, interest or necessity by two of seven members. This is especially so in a statute which requires a quorum of four of the seven men to perform any official acts of any character.[8]

A consideration of the merits of the plurality-majority question has another aspect. Even if a majority vote were not *required* by the statute, such

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[6] 48 Stat. 1082 (1934), as amended, 47 U.S.C. Sec. 303.

[7] 48 Stat. 1066 (1934), as amended, 47 U.S.C. Sec. 154 (a) and (i).

[8] 48 Stat. 1066 (1934), as amended, 47 U.S.C. Sec. 154 (h).

a requirement is *consistent* with the statute. As acknowledged by the Commission in the oral argument in the court below, *the Commission has always administratively required a majority vote of participating commissioners.* Even if the plurality-majority issue were properly present in this case, the Commission's administrative interpretation of its statutory mandate means that the petitioner is asking that the Commission's rule be changed in the middle of a case, without notice to the parties or even knowledge of the Commission that the rule changed. Certainly no one would be more surprised than the members of the Commission to learn that this case was actually decided before Craven voted! Actually, Petitioner is asking this Court to advise the Commission that it had decided a case without even knowing that it had done so. Since the Commission itself is not a petitioner here, this Court may disregard Petitioner's extravagant remarks about the effects of a change in the Commission's majority vote requirement which change has not in fact taken place.

## II

## THE ADMINISTRATIVE FINALITY QUESTION

### The Question Is Moot

The facts on which the waiver question turned are plain. The question asked concerned participation by "*any commissioner who is not present.*" It did *not* relate to persons who were not commissioners, or who might later have become commissioners. Commissioner Webster was, at the time of the question, a "commissioner not puresent." T. A. M. Craven who, up to that point, had been acting in an advocate's role, was not a commissioner at all. These facts are undisputed.

In spite of the absence here of any fact question, in an effort to bring the petition within Rule 19, Petitioner relies on the doctrine of administrative finality as described in this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 71 Sup. Ct. 456, 95 L. Ed. 456 (1951). That case and the doctrine concern the scope of review of evidence supporting findings of fact. Neither the case nor the doctrine has any application to a question of law arising upon undisputed facts. On questions of law, the jurisdiction of the U. S. Court of Appeals for the District of Columbia Circuit to correct the Commission's legal errors is without limitation. Thus, there is no question here of the Court of Appeals' "substituting its judgment" or failing "to give proper and legal effect to the findings and determinations of the Commission." On the contrary, consistent with the jurisdiction of the Court of Appeals, as provided in Section 10 (e) of the Administrative Procedure Act, to set aside agency action "not in accordance with law,"[9] the Court of Appeals reversed the Commission on the legal question of waiver.

**The Court Correctly Found an Absence of Waiver**

The Court of Appeals did not err in its decision on the legal question of waiver. A "waiver is generally defined to be the surrender or relinquishment of an existing right." (Emphasis Supplied) *Helvering* v. *Ethel D. Co.*, 63 App. D.C. 157, 70 F.2d 761, 763 (1934). This principal is otherwise stated in terms of the requirement of *a right, knowledge of*

[9] 60 Stat. 243 (1946), 5 U.S.C. Sec. 1009 (e).

*such right, and a clearly indicated intention to relinquish* such right. *Zenith Radio Corp.* v. *Federal Communications Commission*, 93 U.S. App. D.C. 284, 288, 211 F.2d 629, 634 (1954); *Yates* v. *American Republics Corporation*, 163 F.2d 178, 179 (10th Cir. 1947); *American Locomotive Company* v. *Chemical Research Corporation*, 171 F.2d 115, 121 (6th Cir. 1948).

Here Respondent had no right at all to oral argument before Craven because he was not a commissioner at the time of oral argument. Respondent thus had no choice to insist upon or relinquish an argument before Craven. Insistence by respondent for oral argument before a man who was not then a commissioner would have been futile. There is simply no way to provide an oral argument before persons who are not members of the Commission. Thus, there was in truth and fact no *existing right* which Respondent could have relinquished, and there could, therefore, have been no *knowledge of such right* or *intention to relinquish it*.

Consistent with the above analysis, the Court may reexamine the words used. On their face the plain meaning of those words prevents any conclusion in favor of waiver. The words concerned *commissioners not present*. Nothing was said about non-commissioners or about appointees who might later, if they survived and the Senate approved, become commissioners. If one goes beyond the plain meaning and into the context of the words, the conclusion is the same. Not only was E. M. Webster then a commissioner, but he was also a commissioner "who is not present." Plainly the words applied to him. But T. A. M. Craven was not

then a commissioner at all. In context the words could have no reasonable application to T. A. M. Craven. Finally, it is simply unrealistic to contend that Respondent consented to let another party's advocate break an impasse and cast the deciding vote either with or without oral argument.

## CONCLUSION

The plurality-majority issue is claimed by the Petitioner to involve, within Rule 19, the Court of Appeals' decision on an important question of federal law which has not been, but should be settled by this Court. The fact is that said question was moot before the Court of Appeals and is moot here. In addition, if the question were not moot, the rule of the *Chenery*, case *supra*, provides another obstacle to the consideration of the question. And had the Court of Appeals decided that a majority vote—and not a plurality—was required, that decision would have been correct and a decision contrary thereto would change the Commission's administrative rule in the middle of a case.

The Court of Appeals' decision on the waiver question is claimed by the petition to involve, within Rule 19, a decision on the federal question of administrative finality in conflict with the decisions of this Court. But, the Court of Appeals' decision on waiver decided a question of the law of waiver, with which the doctrine of administrative finality has nothing to do. Whether or not this is a federal question within the meaning of Rule 19, the Court of Appeals' decision was not in conflict with any decisions of this Court.

It is submitted that neither of the efforts to avoid the effect of Commissioner Craven's voting with-

out having heard oral argument has merit. The petition should be denied.

Respectfully submitted,

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## APPENDIX A

### Communications Act of 1934, as Amended

Section 4 (a)

"The Federal Communications Commission (in this chapter referred to as the "Commission") shall be composed of seven commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman." (48 Stat. 1066 (1934), as amended, 47 U.S.C. Sec. 154 (a)).

Section 4 (i)

"The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." (48 Stat. 1066 (1934), as amended, 47 U.S.C. Sec. 154 (i)).

Section 303

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

. . .

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified. . . ." (48 Stat. 1082 (1934), as amended, 47 U.S.C. Sec. 303 (l)).